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May 5, 2017

VIA CM/ECF

Hon. Peter R. Marksteiner
Circuit Executive & Clerk of Court
U.S. Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Re: *Amgen Inc., et al. v. Sanofi, et al.*, No. 17-1480
Response to Defendants' Rule 28(j) Letter

Dear Mr. Marksteiner:

Nichia Corporation v. Everlight Americas, Nos. 2016-1585, -1618 (Fed. Cir. Apr. 28, 2017) should not be read to alter the well-established standard for permanent injunctive relief. The Supreme Court in *eBay v. MercExchange*, 547 U.S. 388, 391 (2006) clearly directed that such decisions are committed to the equitable discretion of the trial courts based on the balancing of factors in each case and should not be constrained by categorical legal rules. *See* Amgen Br.81-82; Abbvie Amicus Br.16-20. In this case, the district court cited and applied the traditional four-factor test restated in *eBay* and exercised its equitable discretion in granting the injunction.

Defendants seize on *Nichia's* statement that a movant "must prove that it meets all four factors." Op.21. But that statement is not a holding; it was not necessary to the decision in that case, and there is no indication that the Court intended to call long-established precepts of equity into question. The district court there denied an injunction after finding that the plaintiff would not suffer irreparable harm. Op.5, 19. The plaintiff presented no evidence of lost sales or price erosion; the parties were not meaningful competitors; and the plaintiff had licensed its patents to other competitors. Op.22-25. Based on that record, this Court concluded there was no abuse of discretion in denying an injunction. Op.23-26. That affirmance is unremarkable, as irreparable harm is the *sine qua non* for injunctive relief.

Defendants argue that the injunction here should be reversed because Amgen "failed" to establish the public interest would not be disserved by the injunction. But the district court determined that the public interest weighed slightly against injunctive relief only because of a generalized public interest in "having a choice of drugs," and then granted the injunction. Appx33-34. Properly so because, as this Court held in *WBIP v. Kohler*, 829 F.3d 1317, 1343 (Fed. Cir. 2016), "having more manufacturers of a life-saving good in the market" is *not* a sufficient basis for denying injunctive relief. Under that controlling precedent, the asserted public interest here provides no basis for finding an abuse of discretion and overturning the injunction.

Respectfully submitted,

/s/ Daryl L. Joseffer
Daryl L. Joseffer

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTIFICATE OF SERVICE

I certify that I served a copy on counsel of record on May 5, 2017
by:

- ☐ U.S. Mail
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- ☒ Electronic Means (by E-mail or CM/ECF)

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